proceedings as requested by MCI.[9] AT&T filed comments in support of MCI's Petition, contending that, "[a]s MCI's petition convincingly demonstrates, there is an urgent need for the Commission to prevent LEC misuse of the freeze mechanism to throttle . . . competition." AT&T's Comments at 1 (Exh. 13).[10]

MCI and AT&T have followed up these efforts at the FCC by filing their complaints in this Court. MCI and AT&T each assert two counts under the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110g, alleging that SNET's PIC freeze service, known as "Carrier Choice Protection," is an unfair trade practice and is deceptive to consumers.[11] MCI also asserts counts for tortious interference with business expectancy, tortious interference with contractual relationships, and unfair competition, all based on the same allegations underlying the CUTPA claims. MCI finally asserts a breach of contract claim, based again on one of the

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[9] The FCC solicited public comment on May 5, 1997, just six days after MCI filed suit in this Court. All comments were due on June 4, with reply comments due on June 19. Public Notice, File No. CCB/CPD 97-19 (Exh. 11.) SNET filed its comments on June 4 (Exh. 12), in which it defended the legality and public purpose of its PIC freeze service, argued that the rulemaking was premature as it would duplicate the rulemaking required by the 1996 Act, 47 U.S.C. § 258, and discussed why each provision of MCI's proposed rule would be improper or unnecessary.

[10] Numerous other long distance carriers, local telephone companies and trade associations filed comments on MCI's Petition.

[11] If required to litigate MCI's and AT&T's claims in court, the defendants would first pose substantial challenges to the complaints, including the threshold legal and policy question of whether CUTPA even encompasses the activities of telecommunications common carriers. Those activities have traditionally been regulated by the FCC and the Connecticut Department of Public Utility Control, and not by the Federal Trade Commission or the Connecticut Department of Consumer Protection. Therefore, the General Assembly may not have intended that CUTPA regulate the conduct of companies like SNET, MCI and AT&T. See Normand Josef Enterprises, Inc. v. Connecticut National Bank, 230 Conn. 486, 512-13 (1994); Russell v. Dean Witter Reynolds, Inc., 200 Conn. 172, 178-82 (1986); see also 15 U.S.C. § 45(a)(2) (common carriers not subject to Federal Trade Commission's enforcement authority); 47 U.S.C. § 258 (FCC to regulate slamming). Moreover, one cannot help but notice the irony that MCI and AT&T are attempting to use a pro-consumer statute to attack SNET's efforts to protect its customers from MCI's and AT&T's own apparent violations of the FCC's consumer protection rules.

allegations on which CUTPA liability is asserted -- the alleged failure by SNET to provide certain customer information to MCI.

The complaints filed by MCI and AT&T merely restate the same allegations about SNET's PIC freeze service as contained in the Petition for Rulemaking and AT&T's comments in support of the Petition. All complain about:

- SNET imposing additional verification requirements beyond those already required by the FCC's slamming rules, MCI's Complaint ¶¶ 31-32; AT&T's Complaint ¶ 19; MCI's Petition for Rulemaking at 3-4; AT&T's Comments at 4.

- SNET allegedly providing customers' PIC freeze status to SNET America, but not to MCI or AT&T, MCI's Complaint ¶¶ 49-50; AT&T's Complaint ¶ 22; MCI's Petition for Rulemaking at 5-7; AT&T's Comments at 2-3.

- SNET's rejection of PIC change requests, MCI's Complaint ¶ 31; AT&T's Complaint ¶ 15; MCI's Petition for Rulemaking at 3-4; AT&T's Comments at 5.

- The specific procedures required by SNET for a customer with a PIC freeze to confirm the request for a PIC change, MCI's Complaint ¶¶ 32-36, 41-43; AT&T's Complaint ¶ 19; MCI's Petition for Rulemaking at 6-7; AT&T's Comments at 4-6.

- SNET's policies regarding reinstating a PIC freeze on the line after the customer has switched to MCI or AT&T, MCI's Complaint ¶ 38; AT&T's Complaint ¶ 23; MCI's Petition for Rulemaking at 7-8.

- SNET's procedures for customers wishing to initiate a PIC change via written authorization, MCI's Complaint ¶¶ 41-43; AT&T's Comments at 4.

- SNET's alleged decision to market Carrier Choice Protection only to users of SNET America's long distance service, MCI's Complaint ¶ 44; AT&T's Complaint ¶¶ 16-18; MCI's Petition for Rulemaking at 6-7; AT&T's Comments at 3-4.

- SNET's wording of its direct mail solicitations for Carrier Choice Protection, MCI's Complaint ¶¶ 45-48; AT&T's Complaint ¶¶ 19-20; MCI's Petition for Rulemaking at 5-6.

In none of these pleadings does MCI and AT&T dispute the magnitude of the problem caused by slamming; nor do they deny the consumer benefit provided by a PIC freeze. Rather,

they take issue with the particular design of SNET's PIC freeze: "PIC freezes benefit consumers if properly designed and administered." MCI's Complaint ¶ 1 (emphasis added). AT&T similarly complains about the specific details of SNET's "marketing, implementation and administration" of the PIC freeze. AT&T's Complaint ¶ 24. Likewise, AT&T, in supporting the Petition for Rulemaking, acknowledged that "the freeze mechanism can provide a useful adjunct to other regulatory compliance and enforcement procedures for controlling slamming," but argued that "recent experience shows that LECs are now extensively misusing the carrier freeze procedure." AT&T's Comments at 2. Accordingly, MCI and AT&T do not request an injunction against all SNET efforts to prevent slamming. Rather, all that MCI and AT&T apparently ask in these cases (and in the proposed FCC rulemaking) is for the Court (and the FCC) to design through an appropriate injunction (and FCC rules) a supposedly fairer service for SNET to offer consumers concerned about slamming.[12/] That is the very essence of an FCC rulemaking proceeding.

SUMMARY OF ARGUMENT

These cases concern whether, when faced with the long distance carriers' record of unlawful behavior in "slamming" consumers, SNET is itself violating consumers' and competitors' rights. MCI and AT&T contend that SNET has gone too far in its anti-slamming efforts and that its PIC freeze service misleads consumers and unfairly impedes competition. They further argue that because they are supposedly in compliance with the FCC's slamming

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[12] For example, in its FCC comments, AT&T noted the supposedly "urgent need for the Commission to protect competition in interexchange, intraLATA and local services by adopting market rules that will assure consumers receive complete and accurate information" about PIC freezes. See AT&T's Comments at 5.

rules, SNET may not do more to verify their PIC change requests without running afoul of the FCC's policies and rules.

The successful prosecution of these cases would require this Court to determine telecommunications public policy and fashion a remedy that limits SNET's practices to what is "just and reasonable" under Section 201(b) of the Communications Act, but still gives SNET appropriate leeway to fulfill its "general obligation to protect [its] customers from fraud and other deceptive or misleading practices" by long distance carriers. See RCI, 11 FCC Rcd. at 8098 (¶ 16). Central to that determination by the Court would be whether or not the FCC determines in the first instance that SNET's alleged actions are either unfair or deceptive or otherwise in violation of public policy. By asking this Court to fine-tune SNET's otherwise lawful protection plan to eliminate allegedly unlawful aspects of the plan, MCI and AT&T ask this Court to engage in the type of detailed rulemaking and policy formulation that are the province of the FCC. In fact, MCI has currently asked the FCC to initiate a rulemaking to adopt its proposed rule on PIC freezes. AT&T supports MCI's Petition and has urged the FCC to adopt several detailed guidelines to govern PIC freezes. AT&T's Comments at 6-9.[13/] By refiling the Petition for Rulemaking in the form of complaints in this Court, MCI and AT&T apparently would like for

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[13] For example, AT&T has asked the FCC to prevent local telephone companies from marketing freezes until one year after fully implementing equal access for regional (intraLATA) toll calls; prevent local telephone companies from implementing freezes for local carrier selection; require local telephone companies to provide supposedly more convenient methods to remove a carrier choice freeze; and require local telephone companies to provide specific information concerning the carrier selection freeze to its local service customers. Id. MCI, among its several proposed rules, has asked the FCC to require SNET to provide any requesting carrier the name and telephone number of all customers with a PIC freeze on their line. Petition for Rulemaking at 9. MCI raises that same issue in the breach of contract claim in its complaint (¶¶ 27-28, 49-53, 69). That claim cannot be addressed without first resolving the scope of customer information confidentiality provided by the 1996 Act, 47 U.S.C. § 222, and the FCC's regulations at 47 C.F.R. § 64.1201.

this Court to adopt, in the form of an injunction, the same detailed proposals they have placed before the FCC.

The primary jurisdiction doctrine requires that this Court coordinate its handling of these cases with the agency that Congress entrusted with formulating national policy on telecommunications. In the 1996 Act, Congress expressly stated its intent that the FCC resolve, through rulemaking, the obligations of the competitors submitting carrier change requests and the local telephone companies executing those requests -- and to apply those rules in both the long distance and the newly competitive local markets. Resolution of these cases cannot be divorced from the context in which SNET's PIC freeze service arose -- the long-distance carriers' persistent violations of consumer rights, and the FCC's regulatory actions to deal with this problem in a balanced and consistent manner.

It is therefore necessary for this Court to dismiss or stay these cases to allow the FCC the opportunity in the first instance to determine the parties' rights vis-a-vis each other as part of the FCC's larger mission to ensure that the public interest is served in the manner intended by Congress.

ARGUMENT

Under the doctrine of primary jurisdiction, the Court should refrain from hearing these actions brought by MCI and AT&T. The Court should not place itself in the position of continually looking over its shoulder at what the FCC is doing in the same field at the same time and to adjust its rulings, preliminary injunctions and even its final judgment over time to ensure compliance with the national policy judgments made by the FCC. It is plain that MCI and AT&T are hedging their bets with these cases, hoping to obtain a ruling in one forum favorable to themselves that they can then use as a stick in the other forum if events there are not to their

liking. It is precisely to deal with this situation of a court exercising jurisdiction over a dispute pending before, or within the expertise of, a specialized agency that the courts have developed the doctrine of primary jurisdiction. Under that doctrine, this Court should defer to the FCC to make the decisions called for in the complaints.

Primary jurisdiction is a principle of prudence and judicial administration "designed to achieve coordination between administrative agencies and the courts." Puerto Rico Maritime Shipping Auth. v. Valley Freight Sys., Inc., 856 F.2d 546, 549 (3d Cir. 1988); accord United States v. Western Pac. R.R., 352 U.S. 59, 63, 77 S. Ct. 161 (1956) (primary jurisdiction "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties"). "The problem, strictly speaking, is not one of jurisdiction. Indeed it comes into play only when both the court and the agency have jurisdiction over at least portions of the dispute. Rather the problem is one of harmony, efficiency, and prudence." Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580 n.1 (1st Cir.), cert. denied, 444 U.S. 866, 100 S. Ct. 138 (1979).

The primary jurisdiction doctrine may be invoked whenever "'enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.'" Goya Foods, Inc. v. Tropicana Prods., Inc., 846 F.2d 848, 851 (2d Cir. 1988) (quoting Western Pac. R.R., 352 U.S. at 64); accord Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 684-85, 85 S. Ct. 1596 (1965); Western Union Tel. Co. v. Graphic Scanning Corp., 360 F. Supp. 593, 595 (S.D.N.Y. 1973). The rationale underlying the doctrine is two-fold. First, it ensures "'[u]niformity and consistency in the regulation of business entrusted to a particular agency,'" Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303-04, 96 S. Ct. 1978 (1976) (quoting Far East Conference v. United States, 342

U.S. 570, 574, 72 S. Ct. 492 (1952)). Second, the primary jurisdiction doctrine "is intended to recognize that, with respect to certain matters, 'the expert and specialized knowledge of the agencies' should be ascertained before judicial consideration of the legal claim." Goya Foods, 846 F.2d at 851 (quoting Western Pac. R.R., 352 U.S. at 64). Deference thus reconciles the function of an agency charged with regulating an industry with the judicial function of the courts by having "the agency pass in the first instance on those issues that are within its competence. In short, the agency should have the first word." Mississippi Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412, 417 (5th Cir. 1976), cert. denied, 429 U.S. 1094, 97 S. Ct. 1109 (1977).

In Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113, 114-15, 94 S. Ct. 466 (1973), the Supreme Court enumerated three factors that a district court should consider when exercising its discretion to defer to an agency's consideration of an issue under the doctrine of primary jurisdiction: (1) whether the agency determination lay at the heart of the task assigned the agency by Congress; (2) whether agency expertise was required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative of the claim before the court, the agency's considered view of the issue would materially aid the court. The facts of these cases readily satisfy this test.

A. The Proper Implementation of a PIC Freeze Lies at the Heart of the Task Assigned to the FCC by Congress.

Having just requested that the FCC issue detailed rules to govern the supposedly unfair or deceptive aspects of PIC freezes, MCI and AT&T can hardly deny that the issues raised in their complaints fall squarely within the FCC's jurisdiction. Congress further cemented the FCC's central role on this issue by making the mechanism governing consumers' selection of their telephone company a key component of the national policy favoring competition in

telecommunications. It therefore directed the FCC in the 1996 Act, 47 U.S.C. § 258, to issue rules governing the verification procedures that both long distance and competitive local carriers must use before submitting carrier change requests and that local telephone companies must use before executing those requests. Congress recognized that the FCC was already regulating PIC change requests in the long distance market but wanted to ensure that there would be no regulatory gaps now that local telephone service would similarly be competitive. See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458 (1996), at 136 ("Joint Explanatory Statement"). The rules that the FCC promulgates take on added significance given the stiff penalties for their violation as mandated by Congress. See 47 U.S.C. § 258(b); Joint Explanatory Statement at 136.

Even before the 1996 Act, Congress provided the FCC with the tools to address slamming. Sections 2 and 201(b) of the Communications Act confer broad regulatory authority on the FCC to regulate rates and practices of common carriers in the interstate long distance market. 47 U.S.C. §§ 152, 201(b). Similarly, Section 205(b) of the Communications Act directs the FCC upon receipt of a complaint or on its own initiative to determine and prescribe what practices are "just, fair and reasonable, to be thereafter observed." 47 U.S.C. § 205(b). The FCC also has authority under § 202(b) of the Communications Act to determine whether a carrier has engaged in "unjust or unreasonable discrimination in . . . practices . . . or services . . . or [has] ma[d]e or give[n] any undue or unreasonable preference or advantage to any particular person." 47 U.S.C. § 202(b). MCI's Petition for Rulemaking (p. 8) expressly invokes the FCC's jurisdiction to define just and reasonable practices. "Congress has placed squarely in the hands of the [FCC]"

the authority to determine the reasonableness of a carrier's practices. Kaplan v. ITT-U.S. Transmission Sys., 831 F.2d 627, 631 (6th Cir. 1987).[14/]

Having identified slamming as the number one consumer problem with common carriers within its jurisdiction, the FCC has exercised its regulatory authority to the fullest. Under that authority, the FCC has issued two sets of slamming regulations and taken numerous enforcement actions, including actions against MCI and AT&T. See supra, pages 3-4. It has also evaluated slamming practices and PIC freezes under its complaint jurisdiction in the RCI decision. See supra, pages 4-5. These examples clearly demonstrate that slamming is not an issue on the fringes of the regulatory agenda, but is central to the FCC's efforts to bring the benefits of competition to consumers of all telecommunications services.

Particularly because "Congress charged the FCC with exclusive federal jurisdiction to uniformly regulate interstate transmissions or communications," GTE Sprint Communications Corp. v. Downey, 628 F. Supp. 193, 194 n.2 (D. Conn. 1986) (Nevas, J.), this Court should not rule on the issues raised by MCI's and AT&T's complaints. Deference under the primary jurisdiction doctrine helps secure "[u]niformity and consistency in the regulation of business entrusted to a particular agency." Far East Conference v. United States, 342 U.S. 570, 574 (1952); accord GTE Sprint, 628 F. Supp. at 195. In this instance, "[i]t would be impossible for the FCC to fulfill its function of regulating the long distance telephone market if numerous federal district courts also undertake to decide the substantial questions which directly or indirectly affect the position of the carriers within the market." In re Long Distance

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[14] The 1996 Act did not limit the FCC's authority to continue to address slamming and PIC freezes under 47 U.S.C. § 201(b), in addition to the authority vested by 47 U.S.C. § 258. See 1996 Act, § 601(c)(1) (uncodified), reprinted in 47 U.S.C.A. § 152 historical & statutory notes (West supp. 1997); cf. 47 U.S.C. § 251(i).

Telecommunications Litig., 612 F. Supp. 892, 897 (E.D. Mich. 1985), aff'd in relevant part, rev'd in part on other grounds, 831 F.2d 627 (6th Cir. 1987). "The powers granted to the FCC are a reflection of Congress' intention that one governmental entity be vested with the responsibility of developing, coordinating and enforcing a uniform telecommunications policy." Total Telecommunications Servs., Inc. v. American Tel. & Tel. Co., 919 F.Supp. 472, 478 (D.D.C.), aff'd w/o opinion, 99 F.3d 448 (D.C. Cir. 1996).

It is especially appropriate to defer to an agency's assigned task to formulate policy in an emerging area of law. "The essence of this controversy concerns the FCC's comprehensive regulatory responsibilities in the constantly changing complex telecommunications industry." GTE Sprint, 628 F. Supp. at 195. The FCC has taken an "evolutionary approach to the 'slamming' problem." 1995 Order, 10 FCC Rcd. at 9583 (¶ 47). Over the last decade, it has tinkered incrementally with the rules governing consumers' presubscription to long distance carriers, based on comments from long distance and local carriers and numerous complaints from consumers. See, e.g., id. at 9561-63 (¶¶ 3-7). In doing so, the FCC has "[found] it necessary to prescribe rules that we believe will serve as an informative and useful consumer protection mechanism and an important rule of fair competition for the long distance telephone industry, while recognizing the industry's need for flexibility in marketing services to consumers." Id. at 9564 (¶ 9).[15/]

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[15] See also 1992 Order, 7 FCC Rcd. at 1038 (¶ 1) ("these revisions to our PIC change procedures will provide additional protection to consumers from unauthorized switching of their long distance carriers beyond existing safeguards and without unreasonably burdening competition in the interexchange market"); id. at 1045 (¶ 43) ("we have balanced the costs of third party verification against the benefits to consumers"); 60 Fed. Reg. 35847 (July 12, 1995) ("As competition in the long distance telephone market has emerged, the Commission's experience in balancing consumer protection concerns and IXC marketing flexibility has evolved.").

MCI and AT&T would have this Court violate these sound prudential principles by forging ahead of the FCC in developing the proper balance between consumers' rights, SNET's obligations to those consumers, and MCI's and AT&T's desire for marketing flexibility. Moreover, MCI and AT&T want this Court to focus just on SNET's practices in the long distance market and thus ignore the larger record of all issues relating to slamming in all telecommunications markets in all parts of the country, which the FCC must consider when fashioning solutions appropriate to the nation as a whole. This Court should reject any suggestion by MCI and AT&T that it exercise jurisdiction over just one aspect of the slamming issue (i.e., PIC freezes) in just one part of the telecommunications market (i.e., long distance service) in just one part of the country (i.e., SNET's service area in Connecticut).

The Court should also refrain from fashioning a localized, Connecticut-specific solution to MCI's and AT&T's concerns that SNET is discriminating in favor of its long distance affiliate, SNET America, especially now that local carriers in other regions, like GTE, also provide long distance service, and the local Bell Operating Companies, spun off from AT&T, may also be entering the long distance markets in competition with MCI and AT&T. See 47 U.S.C. § 271 (establishing, as part of 1996 Act, mechanism for Bell Operating Companies to remove restrictions on providing long distance service).[16/] If MCI and AT&T wish to use SNET as a "test case" for what they perceive as a larger, national problem, they should have the FCC investigate and address the problem based on a comprehensive record. That is in fact what MCI and AT&T have suggested in their filings with the FCC in support of a rulemaking. See Petition for Rulemaking at 3; AT&T's Comments at 3.

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[16] SNET is not a Bell Operating Company that is subject to restrictions on entry into the long distance market. See 47 U.S.C. §§ 153(4), 271.

Other courts have rejected the same invitation to interfere with the FCC's authority as assigned by Congress. MCI itself successfully pressed for a stay of a lawsuit brought against it in Unimat v. MCI Telecommunications Corp., No. 92-5941, 1992 WL 391421 (E.D. Pa. Dec. 16, 1992) (VanArtsdalen, J.) (Exh. 14). MCI was sued for negligence and breach of contract in assigning the plaintiff a 1-800 number that was one digit off from another heavily trafficked 1-800 number. The court accepted MCI's argument that, despite the absence of any reference to the Communications Act in the complaint, resolution of the dispute required that the FCC first opine on MCI's duties under Section 201(b) of the Communications Act.

Similarly, in American Telephone & Telegraph Co. v. MCI Communications Corp., 837 F. Supp. 13 (D.D.C. 1993), MCI again successfully moved under the primary jurisdiction doctrine to dismiss a lawsuit seeking damages for MCI's provision of long distance service at secretly negotiated and unfiled rates. The court agreed with MCI that the FCC should decide whether MCI's actions complied "with regulatory standards" or were otherwise sufficiently justified to warrant denying damages. Id. at 16-17. The court was also swayed by the fact that MCI had pending before the FCC a petition for a declaratory ruling on its liability for the same actions at issue in the lawsuit. Id. at 17. The court therefore found that "the resolution of these issues will require the application of policy judgments better left to the expertise of the FCC," and that deference would alleviate the "danger of inconsistent rulings." Id.

Furthermore, AT&T was itself successful in invoking the primary jurisdiction doctrine in MCI Communications Corp. v. American Telephone & Telegraph Co., 496 F.2d 214 (3d Cir. 1974), precisely because -- like in the instant cases -- its duties as a then-local carrier toward a provider of long distance service were not clear and unequivocal under the FCC's existing orders and the FCC had initiated a proceeding to clarify the scope of AT&T's duties. Id. at 220-21.

AT&T also convinced a court to refer to the FCC a lawsuit regarding its duties toward a provider of telecommunications services in Total Telecommunications Services, Inc. v. American Telephone & Telegraph Co., 919 F. Supp. 472 (D.D.C.), aff'd w/o opinion, 99 F.3d 448 (D.C. Cir. 1996). Another court also deferred to the FCC to evaluate a carrier's uncertain duties to provide the plaintiff with particular billing and collection services. Mical Communications, Inc. v. Sprint Telemedia, Inc., 1 F.3d 1031 (10th Cir. 1993). The court noted that the services were of a relatively new type, that the FCC had regulated the services in a number of orders and rulings without resolving the precise issue in the lawsuit, and that the precise issue was in fact pending before the FCC. Id. at 1039-40.

These cases dictate that courts should leave to the FCC the development of industry standards that go "far beyond the interests of the parties before this Court." IPCO Safety Corp. v. WorldCom, Inc., 944 F. Supp. 352, 357 (D.N.J. 1996); see Total, 919 F. Supp. at 481 (issues affect relationship between all access providers and local exchange carriers). This Court should not itself undertake the duty, which is at the heart of the task assigned by Congress to the FCC, to develop uniform, national policies designed to protect consumers but without unnecessary interference with the congressional goal of encouraging the development of competitive markets.

B. MCI's and AT&T's Complaints Require the Determination of Technical Facts Based on Administrative Expertise.

These cases require balancing a local telephone company's obligations towards its customers with its duties to long distance carriers, and ensuring that any balance struck by a court complies with the requirements of the Communications Act. There can be no dispute that the FCC is both well equipped and in the best position to tackle that assignment. Its Common Carrier Bureau has been at the forefront of enforcement efforts against long distance carriers and has accordingly developed an appreciation for the marketing practices of long distance carriers

and local telephone companies and how they affect consumers. The FCC itself through two rulemakings has gained an understanding of how fine the balance may be between too much and not enough regulation to ensure both a vigorously competitive yet fraud-free market. See supra, pages 3-4. In its 1992 Order, for example, the FCC weighed the concerns of numerous commenters that a 14-day waiting period before a long distance company could in some cases submit a PIC change request following a telemarketing call was anti-competitive, but decided that the waiting period was a necessary prophylactic measure and that the commenters had overstated the effects of waiting on competition. 7 FCC Rcd. at 1045-46 (¶ 47). At the same time, however, the FCC rejected a commenter's request for an even longer, 21-day waiting period. Id. Moreover, having amassed and studied scores of consumer complaints over the years, the FCC's staff is able to detect patterns of behavior that would not always be evident from a more limited record in court. See, e.g., 1994 NPRM, 9 FCC Rcd. at 6886 (¶ 6).

The comments that AT&T recently filed with the FCC in support of MCI's Petition for Rulemaking underscore the need for agency review of MCI's and AT&T's concerns about PIC freezes. In its comments, AT&T was generally supportive of the concept of PIC freezes for protecting consumers, but asked the FCC to consider the manner in which PIC freezes had been implemented in practice and to adopt a detailed blueprint to ensure that any one local carrier's PIC freeze plan does not cross an invisible line and hinder competition. See AT&T's Comments at 2, 5-9. When an agency is already "reviewing in some detail the [relevant] facts and circumstances . . . [d]evelopment of the factual context by those expert in the area, is an established basis for primary jurisdiction." Mississippi Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412, 420 (5th Cir. 1976) (citations omitted), cert. denied, 429 U.S. 1094, 97 S. Ct. 1109 (1977) ("MP&L").

The "expertise" that agencies lend to a disputed issue "is not merely technical but extends to the policy judgments needed to implement an agency's mandate." Allnet Communication Serv., Inc. v. National Exchange Carrier Ass'n, 965 F.2d 1118, 1120 (D.C. Cir. 1992); accord Total, 919 F. Supp. at 478 ("The agency's expertise is not limited to technical matters, but extends to the agency's mandate to implement, in this case the Telecommunications Acts of 1934 and 1996, and the concomitant policy judgments it must make"). In the cases at hand, defining what practices by SNET as alleged in the complaints (see supra, pages 7-8) may be "just and reasonable" under Section 201(b) of the Communications Act, or may be consistent with Congress's mandate in the 1996 Act, 47 U.S.C. § 258, require precisely the expertise referred to in those decisions. It was just that expertise that the FCC brought to bear on PIC freeze issues in the RCI case (see supra, pages 4-5), and on slamming issues generally in the rulemakings and investigations of MCI, AT&T and other long distance carriers (see supra, pages 3-4).[17/] The reasonableness of a practice under the Communications Act "should, of course, be reviewed by an agency because it is an 'abstract quality represented by an area rather than a pinpoint.'" National Communications Ass'n v. American Tel. & Tel. Co., 46 F.3d 220, 223 (2d Cir. 1995) (quoting Danna v. Air France, 463 F.2d 407, 410 (2d Cir. 1972)).[18/]

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[17] All of this activity by the FCC is a direct result of its monitoring, evaluating and rating of carrier practices generally, and more specifically with regard to practices concerning presubscription to long distance carriers. See FCC, Common Carrier Scorecard (Fall 1996).

[18] In National Communications Ass'n, the Second Circuit did not invoke the primary jurisdiction doctrine because, unlike MCI's and AT&T's complaints here, the complaint there focused on the enforcement, and not the reasonableness, of a tariff, based on a clear set of rules that presented a factual dispute unique to the parties to the lawsuit. See 46 F.3d at 223-25. Cf. Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp., 84 F.3d 91, 97 (2d Cir. 1996) (primary jurisdiction doctrine inapplicable because state agency lacked jurisdiction to adjudicate breach of contract disputes); General Electric Co. v. MV Nedlloyd, 817 F.2d 1022, 1027 (2d Cir. 1987) (court's consideration of reasonableness of rate not "rude shouldering ahead of administrative body" due to limited powers given to agency in its enabling act).

Thus, before this Court embarks on determining rulemaking details such as SNET's obligation to extend the hours of its business office into the evening (see MCI's Complaint ¶¶ 33-36; cf. AT&T's Comments at 4 n.2, 7) or SNET's obligation to reinstate a PIC freeze on a customer's line after executing a PIC change to MCI or AT&T (see MCI's Complaint ¶¶ 37-40; cf. MCI's Petition for Rulemaking at 7), the Court should obtain the considered wisdom of the FCC on the issues raised in the complaints (see supra, pages 7-8). That is exactly what one long distance carrier did directly when it filed its complaint about PIC freezes with the FCC, leading to the RCI decision, supra. That is what numerous courts have done when confronted with technical issues of how to conform carriers' actions to the requirements of the Communications Act. In supporting a rulemaking at the FCC, MCI and AT&T have acknowledged the need for further guidance from the FCC in this unsettled area of law. Rather than deciding whether to adopt the rules proposed by MCI and AT&T before the FCC, this Court would be better served by heeding the observation of the Third Circuit, with regard to an earlier period of change in the telecommunications market:

> For a court to resolve this issue results in a judicial determination of the scope of permissible competition between the specialized carriers, such as MCI, and the existing carriers, such as AT&T. Such a determination, involving, as it must, the comparative evaluation of complex technical, economic, and policy factors, as well as consideration of the public interest, should be made, in the first instance, by the administrative agency which has been entrusted with the primary responsibility for making such a determination and which has the expertise necessary for the development of sound regulatory policy.

MCI Communications Corp. v. American Tel. & Tel. Co., 496 F.2d 214, 222 (3d Cir. 1974). MCI's and AT&T's concerns are best left in these circumstances to the FCC's technical and policy expertise.

C. The FCC's Consideration of PIC Freezes Would Materially Aid the Court.

A court has discretion to defer to an agency under the primary jurisdiction doctrine whenever, after weighing the facts and circumstances, it is "very likely that a prior agency adjudication of [the] dispute will be a material aid in ultimately deciding" a contested issue of fact. Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 305, 93 S. Ct. 573 (1973). A court's decision to obtain an agency's views on a factual issue within its expertise is appropriate even where the agency's jurisdiction to consider the contested factual issue is in dispute, id. at 304, and even where the agency's decision might not be "'the end to the matter.'" MP&L, 532 F.2d at 418 (quoting Carter v. American Tel. & Tel. Co., 365 F.2d 486, 499 (5th Cir. 1966), cert. denied, 385 U.S. 1008, 87 S. Ct. 714 (1967)).

The Second Circuit has broadly applied the doctrine where agency action on complex, disputed facts would materially assist the trial court. In Johnson v. Nyack Hospital, 964 F.2d 116 (2d Cir. 1992), the Court of Appeals affirmed the trial court's decision to dismiss the complaint of a physician--whose hospital surgery privileges had been revoked--for failure to resort first to a state administrative agency (New York Public Health Council) before seeking redress in federal court for an alleged antitrust violation. The court reasoned that, with respect to the underlying question of whether the defendant hospital had a proper medical reason for its actions, "[t]he medical expertise of the [Council] will prove extremely helpful in sorting through these complex records, and resolving the factual questions at stake." Id. at 122 (emphasis added).

The material aid rationale articulated in Johnson is further supported by the Fifth Circuit's decision in MP&L. There, the court deferred adjudicating a contract claim pending resolution of an agency proceeding investigating facts relating to the alleged breach. While recognizing that the ultimate question of breach of contract was a judicial issue, 532 F.2d at 416, the court stated

that "[t]here also can be no doubt that the Commission's informed opinion will be of material aid to the district court in the resolution of the damage action." Id. at 420.[19] The court went on to hold that because "referral of this damage action would give the [agency] an opportunity to articulate its rationale and support it with relevant findings of fact . . . the [agency] decisions may either resolve or, at a minimum, be of material assistance to the trial court." 532 F.2d at 420.[20]

There can be no question that deferring to the FCC to gather the relevant facts on slamming and PIC freezes and marshal them into a meaningful pattern would materially aid this Court on determining liability issues under CUTPA as well as MCI's ancillary claims for tortious interference and breach of contract. Not only has the FCC been applying its expertise to slamming issues for several years now, but it will develop a record specifically concerning SNET's PIC freeze service in the context of the industry as a whole when it resolves the pending Petition for Rulemaking or when it initiates the rulemaking required by Congress under 47 U.S.C. § 258. While it is possible that the FCC may fully resolve one way or the other the claims brought here by MCI and AT&T, even if that were not so, at the very least the record developed by the FCC will help organize the facts, allow the issues to be narrowed, and provide for a more

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[19] The Second Circuit in Goya Foods, Inc. v. Tropicana Products, Inc., 846 F.2d 848 (2d Cir. 1988), referred to the MP&L invocation of the "material aid" rationale for agency deference as applying particularly "in the context of heavily regulated industries," and noted that MP&L's rationale is less appropriate where the litigation "'deals with a single event which requires no continuing supervision by the regulatory agency.'" Id. at 852 n.1 (quoting MP&L at 419). Goya Foods dealt with a trademark infringement case and observed that "[w]e are not dealing here with a regulated industry." Id. at 853. By contrast, in the cases at hand, there is little question that SNET's equal access and PIC change obligations are heavily regulated and involve continuing supervision by the FCC. Certainly, the questions raised in these cases bear at least the same importance from a regulatory standpoint as the question of medical incompetence that the Second Circuit, four years after it decided Goya Foods, considered appropriate for agency deference in Johnson.

[20] The court also emphasized the "advisability of invoking primary jurisdiction . . . when the issue is already before the agency," id., which is the case here.

focused, informed and orderly presentation in this Court. See Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 60 (2d Cir. 1994); MP&L, 532 F.2d at 420. So, for example, if the FCC determines that SNET's particular PIC freeze service is consistent with the policies underlying the FCC's slamming rules, MCI would be precluded in this case from basing SNET's liability on some claimed inconsistency between SNET's service and the FCC's rules.

It would be wasteful for this Court to plow forward at this stage to adjudicate MCI's and AT&T's claims, when the FCC will be considering the same claims. MCI chose to pursue its administrative remedies at the FCC. There can be no prejudice to MCI or AT&T by requiring them to obtain relief from the FCC. It would be wrong to involve this Court further with matters that are primarily within the FCC's jurisdiction and that the FCC will be deciding -- whether it is in response to MCI's Petition or pursuant to Congress' directive in 47 U.S.C. § 258.

D. The Court Should Direct MCI and AT&T to File Their Complaints with the FCC.

MCI and AT&T have asked the FCC to grant MCI's Petition for Rulemaking and resolve all of their concerns about SNET's PIC freeze service. Even if the FCC decides not to grant the Petition, the FCC will still be required under the 1996 Act to formulate rules governing SNET's processing of PIC change requests. See 47 U.S.C. § 258; RCI, 11 FCC Rcd. at 8099-8100 (¶ 21), 8105 (¶ 33). Nevertheless, the FCC does need to make rules to address MCI's and AT&T's dispute with SNET. Rather, MCI and AT&T can require the FCC to consider SNET's particular practices at issue here by filing complaints against SNET with the FCC for the recovery of damages. See 47 U.S.C. §§ 207-209; see generally RCI, supra. The FCC can also, upon complaint of MCI and AT&T, determine whether SNET's practices violate the Communications Act and, if so, prescribe what practices are "just, fair and reasonable, to be thereafter followed." 47 U.S.C. § 205. In any proceeding before it, the FCC may issue "such orders, not inconsistent

with this [Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Under that provision, the FCC may grant interim relief, including injunctive relief. See United States v. Southwestern Cable Co., 392 U.S. 157, 181, 88 S. Ct. 1994 (1968); Total Telecommunications Servs., Inc. v. American Tel. & Tel. Co., 919 F. Supp. 472, 483 (D.D.C.), aff'd w/o opinion, 99 F.3d 448 (D.C. Cir. 1996). See, e.g., Order, Participation by COMSAT Corp. in a New Imarsat Satellite Sys., 10 FCC Rcd. 1061 (1995); Memorandum Opinion and Order, Business Wats, Inc. v. AT&T, 7 FCC Rcd. 7942 (1992).

Because the FCC has such broad powers to grant relief to those victimized by unreasonable practices, see Southwestern Bell Tel. Co. v. Allnet Communications Servs., Inc., 789 F. Supp. 302, 304 (E.D. Mo. 1992), courts have invoked the primary jurisdiction doctrine and ordered the plaintiff to submit its dispute to the FCC, even when the dispute was not already pending before the FCC. This Court did so in GTE Sprint Communications Corp. v. Downey, 628 F. Supp. 193 (D. Conn. 1986) (Nevas, J.), ordering the plaintiffs to file a petition for declaratory ruling with the FCC. Id. at 196. In Western Union Telegraph Co. v. Graphic Scanning Corp., 360 F. Supp. 593 (S.D.N.Y. 1973), the court ruled that the plaintiff "will be able to obtain full relief by filing his complaint with the F.C.C." Id. at 596. There is no impediment to MCI and AT&T taking their dispute with SNET in its entirety to the FCC. If MCI and AT&T seek damages and injunctive relief specifically directed at SNET, they may file a complaint with the FCC. This Court should therefore dismiss or stay this action and direct MCI and AT&T to pursue all available remedies at the FCC.

CONCLUSION

For the foregoing reasons, the Court should invoke the doctrine of primary jurisdiction and refer MCI's and AT&T's complaints to the FCC. The Court should therefore dismiss or stay the complaints.

Respectfully submitted,

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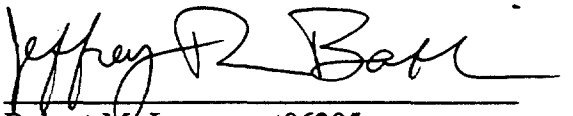
THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY and SNET
AMERICA, INC.

By: 

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

MCI TELECOMMUNICATIONS CORPORATION, Plaintiff, v. THE SOUTHERN NEW ENGLAND TELECOMMUNICATIONS CORPORATION, THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY and SNET AMERICA, INC., Defendants.	:	CIVIL ACTION NO. 3:97CV00810 (AHN)
AT&T CORP., Plaintiff, v. SOUTHERN NEW ENGLAND TELEPHONE COMPANY, SNET AMERICA, INC. and SOUTHERN NEW ENGLAND TELECOMMUNICATIONS CORPORATION, Defendants.	:	CIVIL ACTION NO. 3:97CV01056 (AHN) JUNE 23, 1997

EXHIBITS TO DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS OR STAY ON GROUNDS OF PRIMARY JURISDICTION

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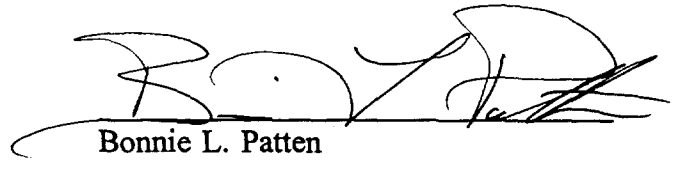

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